

Proposed Article: Negotiations

Section 1. Agreements under this Article

Any agreements reached under the provisions of this Article shall be deemed to be supplemental to this Agreement and subject to approval by the Agency Head.

Section 2. Mandated Changes

- a) If a future statute, Executive Order, government-wide regulation, judicial decision, Agency decision or essential mission need requires the parties to change an Agreement between the parties, the Agency will notify the Union, in writing, of proposed language to implement the change required.
- b) If the Union desires to negotiate the impact and implementation of the change, to the extent permitted by law, it shall notify the Agency within five (5) calendar days. Such request to negotiate shall include a specific timely and negotiable counterproposal for negotiations.
- c) Failure to respond timely to the Agency's notice shall constitute a waiver of any right to negotiate on the proposed required change, and the proposal will become part of the parties' Agreement.
- d) Changes unrelated to the change specifically required by the law, Executive Order, government-wide regulation, judicial decision or essential mission need will not be permitted in the subject negotiations.

Section 3. Other Agency Initiated Changes

- a) The Agency will notify the Union, in writing, of changes that may affect personnel policies practices and working conditions of bargaining unit employees.
- b) If the Union desires to negotiate the substance, if appropriate, or impact and implementation of the change, to the extent permitted by law, it shall notify the Agency within five (5) calendar days.
- c) Such request to negotiate shall include specific, timely and negotiable proposals for negotiations exclusively addressing the matter of the proposed change.
- d) Failure to respond timely to the Agency's notice shall constitute a waiver of any right to negotiate on the proposed change, and the proposal will become part of the parties' Agreement.

Section 4. Information Requests Related to Bargaining Changes

- a) The Agency shall make a good faith effort to provide the union adequate information about the proposed change to allow bargaining to proceed.
- b) The union will ensure that any request for information is accompanied by a demonstration of "Particularized Need" in line with current case law precedents of the Federal Labor Relations Authority and appropriate courts.
- c) If a dispute arises in the course of negotiations, the parties agree that bargaining will go forward. If no agreement is reached and the matter is placed before the Federal Service Impasses Panel(Panel), either party may raise the dispute to the Panel, which shall be authorized by the parties to resolve the dispute consistent with law.

Section 5. Implementation

- a) If the Union has timely requested negotiations regarding a mandated or other change, the Agency will, where possible, delay the implementation of such change until such time as the parties reach agreement on all negotiable issues connected with the change, unless the Agency reasonably believes that:
 - I. There is a mandatory implementation date or contrary intent expressed by the source of the mandated change which requires implementation of the change prior to agreement; or,

- II. The Agency's mission, the security of its staff, or the accomplishment of its mission objectives would be adversely affected by such a delay.
- b) Nothing shall preclude the employer from implementing a proposed change on or after the implementation date proposed in its original notice should the union fail to meet an obligation under this agreement in a timely manner.
- c) Further, should the employer determine that a failure to implement a proposed change on or at any time after the proposed implementation date would adversely affect its mission, it shall be free to implement the change while continuing to bargain on negotiable matters until agreement or impasse is reached.
- d) Notwithstanding the above, nothing shall affect the authority of the Agency to take whatever actions may be necessary to carry out its mission during emergencies.

Section 6. Negotiating Procedures

The following procedures shall govern the conduct of all negotiations pursuant to this Article.

- I. Negotiations shall commence within 5 working days of a notice as described above unless otherwise mutually agreed by the parties.
- II. The Agency will provide a site for negotiations.
- III. The Union will be authorized the same number of Union representatives on official time as the Agency has representatives at the negotiating table.
- IV. Negotiations will take place from (SPECIFY TIME) to (SPECIFY TIME).
- V. Once commenced, negotiations will continue until agreement is reached or impasse is declared.
- VI. If agreement cannot be reached on the matters under negotiation, the following procedures shall apply:
 - A. Declarations of Impasse
 - 1. Neither party may declare an impasse until all proposals are either:
 - a. agreed to;
 - b. declared nonnegotiable by the Agency; or,
 - c. declared at an impasse by either party.
 - 2. The parties agree that each will use their best good faith effort to avoid an impasse in the negotiations and that before formally declaring any provision non-negotiable, the Agency must provide the Union five (5) days notice of intent to take such action, unless unreasonable under all of the facts and circumstances, and provide the Union with a statement of non-negotiability and reasons therefore, without prejudice to later supplementation of the reasons.
 - B. Impasse Procedures
 - 1. In the event either party declares an impasse in negotiations, the Federal Mediation and Conciliation Service shall be requested to provide services and assistance to resolve the dispute pursuant to 5 U.S.C. § 7119.
 - 2. If mediation services of the Federal Mediation and Conciliation Service do not result in resolution of the impasse, either party may invoke the services of the Federal Service Impasses Panel pursuant to 5 U.S.C. § 7119. Prior to taking such action, however, the party seeking to invoke the services of the Federal Service Impasses Panel must provide 14 days notice to the opposing party of its intention to take such action, unless unreasonable under all of the facts and circumstances.

Bargaining I&I: Get the Agreement Right

Impact and implementation (I&I) bargaining is the most frequent negotiation experience in the Federal sector for a great many reasons. This is because an Agency may choose to exercise its rights, make an operational decision or need to change a way of doing something. Any of these may effect employee working conditions and trigger an obligation to negotiate.

So the parties go to the table and reach an agreement, then what? Federal labor law requires that either party must reduce such an agreement to writing at the request of the other (see 5 USC 7114(B)(5)).

Let's look at what ought to be included or at least considered for inclusion in a written MOU that memorializes any agreements reached. Some of these may seem obvious to very experienced practitioners but may be less so to managers who are increasingly involved in conducting I&I negotiations on their own. Each point may form a clause in the final agreement.

1. Parties

The parties to the MOU are those named in the certification of exclusive representative. This is important, for example, if you're a manager in a Department of Veterans Affairs Medical Center where there's a local union (NFFE) that owns the recognition rather than one which is part of DVA's huge consolidated bargaining unit with AFGE. It's important that the parties to such an agreement are not listed as, for example, DVA and AFGE, the players on DVA's national bargaining stage. In addition identify what the parties will be called in the MOU. My preference always was to call the agency "the Agency". I didn't want an arbitrator who might read the agreement to think he/she was dealing with a private sector company or organization. Your parties clause might say:

"The parties to this agreement are the U.S. Department of Veterans Affairs, Sleepy Hollow Medical Center, Headlesstown, New York (the Agency) and the National Federation of Federation of Federal Employees, Local 666, Affiliated with the International Association of Machinists and Aerospace workers, AFL-CIO(the union)."

2. Background/Purpose/Context of the Negotiation

This clause will help fix the purpose and context of the negotiation. Using this type of clause defines for the parties the basis of the negotiation and its intent. This can be important in deciding whether it should be folded into the next contract or not. Making the background clear may also help place limits on how broadly or narrowly an arbitrator may be able to apply the MOU. For example:

"This agreement addresses the effect on working conditions of the move of Internal Revenue Service employees of the Repossession Division located on

the execution date of this agreement on the fourth floor of the Downtown Federal Building, 1040 Audit St., Taxem, HI to commercial space at 1099 Levy Blvd. also in Taxem, HI. The move is scheduled to commence on April 15, 2010 and be completed by April 20, 2010.”

3. If a Law or Regulation is Involved, Spell Out the Limits

If the negotiation is to implement a provision of law or regulation, this clause should make clear that the agreement is limited to matters within Agency discretion and cannot amend or change the meaning, purpose, or interpretation placed on it by its author. For example, let's assume the Congress passes a law granting a child care subsidy to employees under specified conditions. The Agency is authorized to implement the law when its budget permits. A clause may read:

“This agreement shall be implemented in a manner consistent with PL 111-99, The Federal Employee Childcare Subsidy Act of 2010. The parties are aware that conditions on the expenditure of any funds for child care are authorized by the statute and not this agreement. This agreement addresses when and how payments shall be made should funds become available.”

4. Make Sure to address the Scope of the MOU

Another suggestion is that the Agency exercise care to limit the scope of a negotiation to unit employees. I'm told that many organizations actually bargain the language of an Agency policy, directive or instruction. I think that is a major mistake. First, Unions get to bargain working conditions not determine Agency policy. Second, whenever you bargain the directive itself, you're permitting the union to develop rules that will cover people both in and out of the bargaining unit. Of course, if the Agency wants its managers and supervisors and other excluded employees beholden to the union for their benefits, have at it. Other scope issues go to matters such as limiting the effect of the MOU to a specific organizational component, category of worker, time period, etc., etc. For Example:

“This agreement addresses negotiable conditions of employment of bargaining unit employees affected by the Agency's issuance of U.S.D.A. Food and Nutrition Service, Western Region Directive 09752, dated March 15, 2009 and titled “Disciplinary Actions”.

5. If to 7106(b)(2) or (3) Applies, Explain Why and How

5 USC 7106(b) <http://www.flra.gov/statutes/fslmrs/fslmrs.html#7106> addresses bargainable procedures at (b)(2) and appropriate arrangements at (b)(3). You should consider identifying any provision that involves one of these. Remember, people come and go but some of these MOUs seem to last forever. For Example:

“The Agency has determined that while the application section 4(d)(1) of this agreement affects managements right to assign work to employees in the woodworker classification at specific times, it has determined that this provision is an appropriate arrangement under 5 USC 7106(b)(3).”

6. Define Terms That Might Confuse a Reader

Always remember that the writers of the agreement have often spent long hours getting to an understanding of an issue and what each term means in the overall context of that agreement. Go home and ask your 13 year old to read your draft MOU. If he or she gets, it then almost anyone will. If he or she doesn't get it, then it's time for definitions. For example:

“The Aerodyne Bicycle referred to in this MOU is a piece of exercise equipment provided in the fitness center and discussed in section b(2).”

7. What both parties will do and be responsible for together

If both parties are responsible for doing something together, spell it out. For example:

“The Agency and the union will meet during the week of July 14, 2008 and quarterly thereafter to discuss the implementation and lessons learned from safety training for the new Glock-15 pistol until all eligible employees have received training course WS-202A.”

8. What Agency management will do and be responsible for

As above, what the Agency will do. For example:

“The Agency agrees to post notices on the intranet under GENERAL ANNOUNCEMENTS advising employees where they may download copies of Agency Directive, dated 7/10/08 titled “Mandatory Call In Procedures During Telework”

9. What the union or employees will do and be responsible for

Again, with specificity, detail what the union or employees must do. For example:

“In order to be eligible to receive a childcare subsidy, an employee must submit a properly and fully completed Agency Form 22-6 to the Human Resources Office electronically no later than 3 work days before the beginning of the month in which a childcare subsidy is being requested”

10. Critical Administrative Details

There are some critical details that should be included to wrap up an agreement. The execution date is the date an agreement is signed, the effective date is the date it goes into effect and remember that 5 USC 7114 (c)(1) provides that “An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.” In addition whether the MOU expires on a certain date or event; whether it becomes part of the collective bargaining agreement or stands alone; or whether other conditions apply should be spelled out. All of these matters should be covered in the MOU. For Example:

“This agreement is entered into this 30th day of July, 2008 and shall be effective no earlier than August 30, 2008”. It will expire upon the expiration date of the collective bargaining agreement between the parties that was effective April 2, 2006 unless terminated by mutual agreement at an earlier date.

MOU Template

Title:

Memorandum of Understanding
or
Memorandum of Understanding
Between
Name of Agency
And Name of Union
or
Memorandum of Understanding
Between
Name of Agency
And Name of Union
Concerning (Subject Matter)

Parties:

Parties. The Parties to this agreement are (Name of Agency), (Name of Activity), referred to herein as the Agency etc. and (Name of Union) and (Name of Local), referred to herein as the Union.

Scope:

Scope of the Agreement. This agreement is subject to the agreement between the parties effective (Date) and (Sample 1) is limited to bargaining unit employees working in Building A. or (Sample 2) is understood to operate within the context of Article X, Section Y.

Background and/or Purpose:

Background. (Sample 1) This agreement arises from the intent of (Name of Activity) to issue a revised instruction concerning changes in the Agency’s fire protection policy at the national level as applied at the activity level. (Sample 2) This agreement results from a decision on the part of the (Agency, Activity) to relocate certain functions from building A to Building B.

Purpose. (Sample1) This agreement specifies the procedures to be followed by employees requesting to use a personal vehicle in lieu of a government vehicle in order to attend long term training. (Sample 2) This agreement constitutes an agreed upon arrangement for employees adversely affected by the Agency's decision to (State).

Common Responsibilities:

Agreement:

- A. The Parties agree to/that (Specify)
- B. The Agency agrees to/that (Specify)
- C. The Union Agrees to/that (Specify)

Modification:

Modification. This agreement may be modified upon the expressed written mutual agreement of the parties.

Termination:

Termination. This agreement terminates upon the expiration of the agreement between the parties dated (DATE).

Effective Date

Effective Date. This agreement shall become effective on (DATE)